UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MICHAEL ZORUMSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:01 CV 616 CEJ DDN
	)	
JO ANNE B. BARNHART, Commissioner of Social Security,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court for judicial review of the final decision of the defendant Commissioner of Social Security denying plaintiff's applications for disability insurance benefits under Title II of the Social Security Act (the Act), 42 U.S.C. §§ 401, et seq., and for supplemental security income benefits based on disability under Title XVI of the Act, 42 U.S.C. §§ 1381, et seq. The court has subject matter jurisdiction over the action under 42 U.S.C. §§ 405(g) and 1383(c)(3). The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b).

Plaintiff Michael Zorumski applied for benefits on July 17, 1998, at age 43. He alleged he became disabled because of bad knees and legs, his knee giving out, and pain suffered when he walks. (Tr. 142). His past employment was as a moving company packer and mover, a janitor, a tire recapper, a laborer, and a carpenter. (Tr. 131).

The administrative record

On July 31, 1998, plaintiff was seen by Grace Beaumont, M.D., on referral by the state agency. In her report, after doing a

physical examination of plaintiff, Dr. Beaumont noted no abnormality other than osteoarthritis in both knees and tobacco abuse. (Tr. 186-87).

On August 28, 1998, plaintiff was examined by orthopaedic doctor James T. Leslie, M.D., on referral by the state agency. Plaintiff had complaints involving both lower extremities. Plaintiff stated that in December 1997, while working, he began to develop constant pain in both knees which he described as a burning sensation. (Tr. 183). On examination, Dr. Leslie found that the plaintiff's gait was unusual; he walked with a seemingly stiff-leg gait and some unevenness of his walking pattern seeming to drag the left leg. The records indicate that he was able to toe and heel walk with difficulty. Dr. Leslie's opinion was that plaintiff should be considered unable to work for at least three months pending further medical evaluation. He recommended a thorough neurological consultation. (Tr. 185).

On November 17, 1998, plaintiff was examined by Thomas F. Satterly, D.O., an orthopaedic physician. Dr. Satterly reported that plaintiff had clonus and spasticity in his legs and that he may have some neuromuscular disorder. He found that plaintiff's straight leg raising was negative, that his knee joints had good range of motion, and that he had no muscle atrophy. He referred plaintiff to Dr. Wazzan, a neurologist. (Tr. 182).

On November 23, 1998, plaintiff was examined by Omar Wazzan, M.D. Plaintiff complained of a progressively worse burning sensation, numbness, and pain which prevented him from walking well. (Tr. 177). Dr. Wazzan's impression was subacute lower extremity pain, numbness and stiffness, and that these findings were consistent with upper motor neuron involvement. Dr. Wazzan wanted an MRI of the brain, a CT scan of the lumbosacral area, and a metabolic laboratory analysis. (Tr. 178).

On November 25, 1998, plaintiff underwent a CT scan of his lumbar spine. The report indicated a very minimal diffuse bulge at

the L3-4 and L4-5 levels. The radiologist found no disc herniation and no spinal canal stenosis. (Tr. 175).

On December 4, 1998, plaintiff was again examined by Dr. Wazzan. He had reviewed the MRI report and found that plaintiff had clonus in his legs and that his gait remained mildly spastic and wide. He noted that approval for an MRI of the brain was pending. (Tr. 168).

The record before the ALJ also included plaintiff's oral testimony. He testified he worked as a packer and mover until January 1998 when the work became too painful for both his knees and legs. (Tr. 29). He testified that both knees and legs throb, burn and tingle. It is difficult for him to sit, stand, walk, and sleep, and even harder to wear clothes because of the pressure against his knees and legs. (Tr. 31-32).

Plaintiff described his very limited physical, daily activities (Tr. 34-36), and testified that, on a scale of one to ten, with ten being hospitalizing pain, the pain in his knees and legs was a ten. He takes aspirin for the constant pain, but without relief. (Tr. 40-43).

The Commissioner's decision

On April 22, 1999, an evidentiary hearing was held before an Administrative Law Judge (ALJ). The ALJ issued his written opinion on May 29, 1999. In that opinion, he made the following findings of fact and conclusions of law that are at issue in this action:

1. Plaintiff has not worked since January 30, 1998.

2. "The medical evidence establishes that [plaintiff suffers from] some type of upper motor neuron involvement."

3. Plaintiff does not suffer from an impairment or combination of impairments listed, or medically equal to one listed, in the Commissioner's list of disabling impairments.

4. Plaintiff's "allegations of symptoms precluding sedentary work are found not credible based on inconsistencies in the record as a whole."

5. Plaintiff "can occasionally lift ten pounds, but cannot walk or stand for prolonged periods." Plaintiff "has the residual functional capacity to perform the full range of sedentary work."

6. Plaintiff cannot perform his past relevant work as a packer or mover, janitor, and tire recapper.

7. Under the Commissioner's regulations, at 44 years of age, plaintiff is a "younger" person; he has a high school education.

8. Under Commissioner's Medical-Vocational Guidelines (Grid) Rule 201.27, administrative notice is taken of the fact that there are a significant number of jobs in the national economy that plaintiff can perform.

9. In consequence, plaintiff is not disabled under the Act.

(Tr. 22-23).

On August 4, 1999, after the ALJ's opinion was rendered, plaintiff received an MRI of his spine. The thoracic spine was normal, but the MRI of the lumbar spine showed a "[g]ood [s]ize" disc herniation at C6-C7 level with moderate spinal canal stenosis with compression on the dural sac and the cord. This is a significant finding." (Tr. 197-98).

The Appeals Council considered the report of the August 4, 1999, MRI, but denied review of the ALJ's decision, which then became the final decision of the defendant Commissioner now before the court for judicial review. (Tr. 2-3).

DISCUSSION

In this judicial review of the Commissioner's final decision, the court

> must determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole. See Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusions." Id. The court may not reverse merely because evidence would have supported a contrary outcome. See id.

Dunahoo v. Apfel, 241 F.3d 1033, 1037 (8th Cir. 2001).

In determining whether the Commissioner's findings are supported by substantial evidence, the court must consider "evidence that detracts from the Commissioner's decision as well as evidence that supports it." Warburton v. Apfel, 188 F.3d 1047, 1050 (8th Cir. 1999).

Under the Act, plaintiff must prove that he is unable to perform any substantial gainful activity due to any medically determinable physical or mental impairment which would either result in death or which has lasted or could be expected to last a continuous period of at least 12 months. See 42 U.S.C. §§ 423(a), 1382c(a)(3)(A).

Under the Commissioner's regulations, plaintiff must first prove that one or more impairments prevent him from performing his past relevant work. Pickner v. Sullivan, 985 F.2d 401, 403 (8th Cir. 1993). If he satisfies this burden, the burden shifts to the Commissioner to prove that he is able to perform some other substantial gainful activity in the national economy, given his residual functional capacity, his age, education, and work experience. Id. As set forth above, the ALJ concluded that plaintiff sustained this burden and the ALJ acknowledged that the burden shifted. (Tr. 21).

In this action, plaintiff argues (1) the ALJ improperly evaluated the evidence of plaintiff's daily activities; (2) the ALJ failed to obtain the testimony of a vocational expert on the availability of work in the national economy which plaintiff can perform; (3) the ALJ erroneously failed to specify jobs and job duties that plaintiff could perform; and (4) the ALJ's decision is not supported by substantial evidence in the record as a whole. Defendant argues that the decision of the Commissioner is supported by substantial evidence and must be affirmed.

Under the regulations, the Commissioner must engage in a five-step analysis of the record. This analysis covers consideration of

any current work activity, the severity of the plaintiff's impairments, his residual functional capacity and age, education, and work experience. 20 C.F.R. § 404.1520(a); Braswell v. Heckler, 733 F.2d 531, 533 (8th Cir. 1984). In this case, the ALJ reached step five and determined that the regulations indicated that there were jobs available for plaintiff and that he was not disabled. On the record as a whole, including the post-hearing MRI report, the denial of benefits is not supported by substantial evidence.

In finding that plaintiff had the residual functional capacity to do other kinds of work and that other work plaintiff could do existed in substantial numbers in the national economy, the Commissioner relied on the Medical-Vocational Guideline rules[1] to take administrative notice of these facts.

Generally, when a decision cannot be made on the medical considerations alone, a disability claimant can properly be evaluated under the Medical-Vocational Guidelines, which take administrative notice of whether a significant number of jobs exist in the national economy for a person with a certain residual functional capacity, age, education, and work experience. Heckler v. Campbell, 461 U.S. 458, 462 (1983). Proper reliance on the Grid eliminates the need for the Commissioner to consider and rely upon the testimony of a vocational expert. McCoy v. Schweiker, 683 F.2d 1138, 1148 (8th Cir. 1982) (en banc). And, when the Grid is properly relied upon, it is unnecessary for the Commissioner to identify specific jobs in the economy that plaintiff can perform, as plaintiff argues. Heckler, 461 U.S. at 467-68.

The law is clear, however, that the Grid may not be used in the case of a claimant who suffers from one or more non-exertional limitations, such as pain. Simons v. Sullivan, 915 F.2d 1223, 1225 (8th Cir. 1990). In such cases, the Commissioner must usually consider the testimony of a vocational expert. Muncy v. Apfel, 247 F.3d 728, 735 (8th Cir. 2001).

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[1]See 20 C.F.R. Part 404, Subpart P, Appendix 2.

In this case, the ALJ expressly found that plaintiff does not suffer from an impairment that precludes all types of work activity. The ALJ discredited plaintiff's allegations of disabling pain. In doing this, he considered the record as a whole, including the objective medical evidence, his lack of treatment and medication,[2] his daily activities,[3] and his lack of work restrictions.[4] (Tr. 21). He found that plaintiff could perform the full range of sedentary work. (Id.)

The undersigned believes that the case must be reversed and remanded to the Commissioner for further consideration of the August 4, 1999, MRI report that indicated a herniated disc.

> The regulations provide that the Appeals Council must evaluate the entire record, including any new and material evidence that relates to the period before the date of the ALJ's decision. See 20 C.F.R. § 404.970(b). The newly submitted evidence thus becomes part of the "administrative record," even though the evidence was not originally included in the ALJ's record. . . . If the Appeals Council finds that the ALJ's actions, findings, or conclusions are contrary to the weight of the evidence, including the new evidence, it will review the case. See 20 C.F.R. § 404.970(b). [If the Appeals Council finds that the subject evidence does not call for review of the ALJ's decision, the reviewing court does] not evaluate the Appeals Council's decision to deny review, but rather we determine whether the record as a whole, including the new evidence, supports the ALJ's determination.

Cunningham, 222 F.3d at 500.

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[2]The ALJ found that plaintiff did not seek treatment for his leg and knee problem until July 1998, six months following his quitting work for this reason. (Tr. 20).

[3]The ALJ did not specify what evidence of activities he relied on or what the activities were. (Tr. 21). Clearly, the ALJ's rendition of plaintiff's testimony in this regard does not support his finding of lack of credibility. (Tr. 18).

[4]The ALJ's reliance on this factor is undermined by the fact that, when plaintiff was examined by the medical sources, he was no longer working.

> In practice, this requires this court to decide how the ALJ would have weighed the new evidence had it existed at the initial hearing.

Bergmann v. Apfel, 207 F.3d 1065, 1068 (8th Cir. 2000). Even in this context, the court may not reverse the ALJ's decision "merely because substantial evidence may allow for a contrary decision." Id.

To qualify as "new" evidence, the report must not be just cumulative of evidence already in the record. Id. Here, the new MRI report indicated a herniated disc, which was not indicated by earlier MRI reports. Therefore, this is new evidence.

To qualify as "material" evidence, it must describe plaintiff's condition during the period of time up to the time the ALJ rendered his decision. 20 C.F.R. § 404.970(b). As set out above, the negative MRI report of the C6-7 level was for an imaging on November 25, 1998. (Tr. 176). The hearing before the ALJ was on April 22, 1999, and the opinion was issued on May 24, 1999. The positive MRI report of C6-7 was for an imaging on August 4, 1999. The issue presented is when did the herniation occur? If before May 24, 1999, the court must consider whether this report is such that it renders the ALJ's decision unsupported by substantial evidence. If after that date, then the report may be important evidence for a new application for benefits.

Clearly, if plaintiff had a herniated disc before the date of the ALJ's decision, such a report would demean currency of the prior MRI reports and perhaps support a determination of a disability onset date later than alleged by plaintiff. In any event, the August 1999 MRI report would provide a substantial basis for plaintiff's subjective complaints of pain. As set out above, if plaintiff suffers from a non-exertional impairment, such as pain, the Medical-Vocational Guidelines cannot be used to decide whether or not plaintiff is disabled and the current decision of the ALJ would not be supported by substantial evidence on the record as a whole.

The date of the herniation (and perhaps a disability onset date) indicated by the August 4, 1999, MRI report is an issue that must be decided by the Commissioner and not by the court. Bergmann, 207 F.3d at 1071. For this reason, the decision of the Commissioner denying benefits must be reversed and the action remanded for further proceedings.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned that the decision of the Commissioner of Social Security be reversed under Sentence 4 of 42 U.S.C. § 405(g) and the action remanded to the Commissioner for further proceedings described above.

The parties shall have until September 16, 2002, in which to file written objections to this Report and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of September, 2002.